

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

76-4236

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRED K. KERPEN AND F. K. KERPEN
& CO. INC.

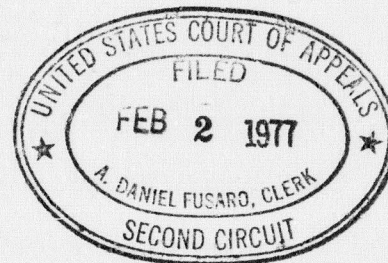
PETITIONERS,

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT.

Civil Appeal
Docket # 76-4236

Admin. Proc. File # 3-4659



B R I E F

By petitioners, requesting that NASD Board's findings, confirmed by SEC OPINION, under Securities Exchange Act of 1934, Release # 12,898, dated October 15, 1976, of, and imposition of Sanctions for VIOLATION OF RULES OF FAIR PRACTICE, and 'for the prevention of such incidents from occurring in the future', be reversed.

Supplementing the record as certified by Respondent I submit, as exhibits # 1 to 6 :
Letter from F.K.Kerpen to Mr. George A. Fitzsimmons, Secretary, SEC, dated January 19, 1976 (2)
" June 30, 1976 (3)
" June 1, 1976 (4)
" November 26, 1975 (5)
" July 14, 1975 (6)
" August 9, 1976 (1)

The SEC opinion fails to resolve the dichotomy in the application of laws, rules and regulations, and the administration thereof, to a mutual fund and to a broker/dealer. It does away with the mutual fund in a one-sentence footnote, attached to the tail-end of the opinion.

In essence, I have handled the Shaynhouse case in the exact same manner in which Dreyfus has taken care of the Borowicz case: An individual strays off the straight path which leaves those who work with him two choices: Call the cops - or try to make good without them or before it becomes absolutely necessary to haul them in.

Dreyfus solved the problem without the cops. There is a statutory obligation on the fund to apprise me as fellow-member of the NASD. Dreyfus not only failed to do so, but went out of its

B
P/S

way to conceal the facts. (See page 1 and 2 of my appeal to the SEC, dated April 5, 1975 and for detailed description, paragraph 4, page 2, of my appeal to the NASD, dated June 12, 1974.) The NASD or the SEC may be able to explain how this is compatible with the observance of 'high standards of commercial honor and just and equitable principles of trade'. I am unable to do so.

The proceedings against me brought to light that there have never been any proceedings against Dreyfus. How is this possible? With conversion of customers' moneys by a Registered Representative involved, as well as falsification of signatures, fraud and unauthorized withdrawals? This is another thing I cannot explain.

A couple of months ago Nebenzahl showed up at a public meeting of the Financial Planners Association as if nothing had ever happened. To my knowledge none of the aggrieved parties has initiated criminal proceedings. Is it not the obligation, codified or implied, of a Federal Agency to notify the District Attorney of a crime?

It was I who brought the Siff-matter - as soon as it broke - to the attention of the NASD, seeking help in what then seemed worthy of a human rescue effort. Instead of assistance I got relentlessly pursued, embarrassed by continuous, adverse publicity and harassed by endless proceedings. As one example, I attach, as exhibit # 7 the findings of an NASD-board sub-committee which summarizes the emptiness of charges and the futility of superfluous proceedings. It might not have come about but for the intervention of a friend and the request to admit public and press to the hearings.

The proceedings in this long-drawn-out case and in the pending case have taken their toll. It would not have been possible for a one-man outfit to endure them and carry on business as usual. Business, however, is not usual anymore with mutual fund sales, particularly in the metropolitan area, having all but vanished. My decade-old struggle against commission expropriations has not made me personagrata within the Association. After years of fruitless effort (including the arbitrary reversal by a fund of a court settlement) I turned to the Commission. Exhibits # 8 to 13). The results are the same - nil.

Proceedings, however, must go on. There are some significant inaccuracies in the opinion. It states that I dismissed Nebenzahl in September 1971 following the receipts....from three of the customers whose funds were converted by Nebenzahl. It was Mr. Siff's telephone call, followed by telephone conversations with him and his in-laws, Mr. and Mrs. Rutner, also clients of Nebenzahl, which caused me to dismiss Nebenzahl and which now is made to appear that I needed alarms from 3 different sides. Under the illusion that my trade association might help Mr. Siff and me to straighten out the matter and contain Nebenzahl, I suggested to Mr. Siff that he contact the NASD for assistance. If Dreyfus, in straightening out the Borowicz case was assisted by the NASD or had the tacit acceptance in its endeavor, I should be entitled to the same. If Dreyfus withheld the facts from the NASD, then they are guilty of what I am guilty of, namely leniency- (aside

from the fact that they withheld everything from me.)

The Opinion states that I suggested that my failure to take such allegations seriously was reasonable in view of the fact that Nebenzahl previously (my underlining) had enjoyed a good reputation in the brokerage community. It was then, not previously, that Nebenzahl stood at the zenith of his career.

The Opinion identifies with the stand the NASD takes concerning new supervisory procedures which it thought I should have drafted. The ridiculousness of having another or a new type-written sheet of paper in one's file drawer is dealt with in my appeal to the SEC, dated April 5, 1975, para 3 and 4. The crux of the matter is: Is, can, or should acceptance of cash by Registered Representatives be prohibited? I have started in this business 25 years ago with First Investors Corporation where I saw Registered Representatives bring in hundreds of thousands of Dollars in cash. To my knowledge there was no law, rule or regulation against it. And to my knowledge there is not today. I would like to go on record that - unless there is a law, rule or regulation against it (which, of course, I will obey to the letter) or I am ordered to do so - I will not restrict the one honest Representative, still registered with me, from accepting cash. Or be restricted myself. The only reason that this is rethorical is that there is no more business to speak of.

On the day the Opinion was published in the Wall Street Journal I spoke to a Representative of a NYSE-member firm and asked how one handles a suspension. I was told, after being ridiculed for taking such punishment so serious: You just don't write a ticket. The implication: Someone else writes it during these days. This is why suspensions are considered effete by the trade - and laughed off. There is a world of difference in the effect of a suspension of the average NASD-member and a one-man shop. While it may be unpleasant at least or a nuisance at worst for the former, it is ruinous for the latter.

But the severe punishment is only one of the purposes of imposing sanctions. With two pats in one, one on its own back and one on that of the NASD-Board, the Commission puts me on the pillory in order to illustrate to other persons its and the Board's commendable seriousness which is attached to failure of proper supervision. How effective an example this concern would have yielded, had it turned to the dealings of a fund with a fraud!

I respectfully request that the affirmation of the findings of the Board of Governors of the NASD, confirmed by the opinion of the SEC, be overturned, the suspension revoked, and the censure, if confirmed, by the Court, be kept unpublicised as required by the NASD By-Laws.

Fred K. Kerpen
Fred K. Kerpen
F.K. Kerpen & Co., Inc.
27 Washington Sq. N.
New York, NY, 10011

F. K. KERPEN & COMPANY, INC.
FINANCIAL PLANNING SPECIALISTS
~~18 EAST 41ST STREET~~ 27 Wash. Sq.N.
NEW YORK, N. Y. 10017

August 9, 1976.

Mr. George A. Fitzsimmons
Secretary
Securities & Exchange Commission
Washington, D.C., 20549.

Dear Mr. Fitzsimmons:

Thank you for having Mr. Bliss reply to my letter of June 30th. I have answered him separately.

I have also submitted to Mr. Donaty a report on a new, concerted action by the funds in expanding commission expropriations. It is to be hoped that they will assist the Commission' determination as to whether or not it should regulate dealer discounts. While it presently does not do so, continual evidence of abuse will point to the benefits or such regulations and consideration of such benefits may lead to a shift of advantages of such regulations outweighing potential disadvantages.

In order to contribute to the Commission's efforts to complete my case I should like to request, with reference to rule 15 Ag-1 (f), an opportunity for oral argument before the Commission. The time limitations of this paragraph do not apply as I offered personal appearance before the Commission in my letter of June 8, 1975, acknowledging the Commission's acceptance of my appeal.

I also request that Dreyfus be subpoenaed to appear in the proceedings whenever they will be held.

Joining you in the hope that they will occur not too long from now, I am

yours sincerely

Fred K. Kerpen
Fred K. Kerpen

TELEPHONE
(212) LEXINGTON 2-9395
477-1183

F. K. KERPEN & COMPANY, INC.
FINANCIAL PLANNING SPECIALISTS
~~18 EAST 41ST STREET~~ 27 Wash. Sq. N.
NEW YORK, N. Y. 10017

January 19, 1976.

Mr. George A. Fitzsimmon
Secretary
Securities & Exchange Commission
Washington, D.C.
20549.

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Dear Mr. Fitzsimmon:

Thank you very much for sending me a copy of my letter of June 14, 1975. I thought I had made a formal complaint about Mass. Financial Services, Inc., but couldn't find anything in my files, needed to base a formal request for withdrawal of a complaint.

Correspondence from the two attorneys of your staff has convinced me of the futility of this approach and I hope to find other means of combatting the expropriations.

Meanwhile, having no intention of abandoning the fight, I submit, some current correspondence in the hope that someone's interest may be aroused. The letter on Crosby's error does not require perusal of the whole file which is added to round out the background. My letter to the president of the Anchor Corp. followed an "exchange of ideas" some of which took place during his presidency of the Investment Company Institute. There are letters in my file, complaints to the NASD, the National Association of Investment Companies and others, the struggle dating back about a decade.

Aside from a settlement in a class action^{SUIT} which benefitted primarily the attorney and brought recovery of a tiny portion of the loot only, nothing has done any good so far.

The expropriations continue merrily.

Sincerely yours

F. K. Kerpen
Fred K. Kerpen

BEST COPY AVAILABLE

477-1183

F. K. KERPEN & COMPANY, INC.

FINANCIAL PLANNING SPECIALISTS

~~18 EAST 41ST STREET~~ 27 Wash. Sq. N.
NEW YORK, N. Y. 10017

June 30, 1976.

Mr. George A. Fitzsimmons
Secretary
Securities and Exchange Commission
Washington, D.C.
20549.

(3)

Adm. Proceedins: # 3-4659

Dear Mr. Fitzsimmons:

Thank you for your letter of June 17, 1976 and for assuring me that the Commission is making every effort to complete my case.

The latest monthly supplement to the NASD Manual arrived in the mail today and as you can see from the attached my case is broadcast again under the heading:

"Actions Taken as to Registered Representatives and Associated Persons".

The subtitle states "the repetition is published by reason of appeal and that bars and suspensions of Registered Representatives are inserted in the Manual Supplement only once and are not repeated in succeeding months".

That means that respondents who accept board decisions without appeal are not given the intensive publicity repetition provides.

I wonder whether the Commission could prevail upon the Board to discontinue such discrimination ?

Sincerely

Fred K. Kerpen
Fred K. Kerpen

TELEPHONE
(212) LEXINGTON 2-9998
477-1183

F. K. KERPEN & COMPANY, INC.

FINANCIAL PLANNING SPECIALISTS

~~18 EAST 21ST STREET~~ 27 Wash. Sq. N.
NEW YORK, N. Y. 10011

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June 1, 1976.

Mr. George A. Fitzsimmons
Secretary, S.E.C.
Washington, D.C. 20549.

Administrative Proceeding
File # 3-4659

Dear Mr. Fitzsimmons:

In my letter of Nov. 26, 1975 I requested that the proceedings in this matter against me be put on the calendar at an early date and inquired whether there was anything I could do to speed them up. I mentioned the publicity my "case" received several times in the monthly supplement to the HASD manual.

That repeat seems now to have become a permanent fixture, my "case" being reprinted in April and again in May. Seems it will now be published monthly.

There is a fund which not only continues to do business with a Registered Representative after it finds out that he has become a forger and a thief, but withholds the facts from the dealer with whom he is registered. The fund doesn't get involved by the authorities in a "case", isn't subjected to long, painful, time-consuming and costly proceedings, as does the dealer, but the dealer not only gets censured and penalized and his "case" - notwithstanding a disclaimer which is ineffectual until the "case" itself is decided - gets trumpeted all over the investment community. The other day I ran into a former colleague from First Investors Days I hadn't seen in maybe 15 years (and who knew me as honest then). "What, you Kerpen? How did you get into this?"

I feel that the continued publicity has prejudiced my "case" and, again, request that it be put on the calendar with deliberate speed.

Thank you for your early attention to this plea.

Sincerely

F. Kerpen
Fred K. Kerpen

Fred K. Kerpen
Letter to: Mr. George A.
Fitzsimmons

Page two

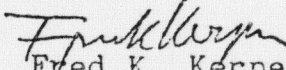
I have therefore looked forward to a decision by the Commission so that I could put the matter behind me.

As irony wills it the dreaded suspension could now harm me considerably more materially. As stated in one of my appeals, I have joined a Municipal Bonds house in order to make a living. I have worked in the field for over a year. As of December 1, 1975, municipal bond firms have some under the jurisdiction of the Commission.

I'm going to be away the first week in December and wonder whether the proceedings could be put on the calendar at an early date, or whether there is anything I could do to speed them up?

Your attention and reply to this matter is very much appreciated.

Sincerely


Fred K. Kerpen

477-1183

F. K. KERPEN & COMPANY, INC.

FINANCIAL PLANNING SPECIALISTS

~~18 EAST 41ST STREET~~ 27 Washington Sq. N.
NEW YORK, N. Y. 10017

November 26, 1975.

Mr. George A. Fitzsimmon
Secretary, S.E.C.
Washington, D.C., 20549.

Dear Mr. Fitzsimmon:

Would you, please, be good enough and mail me a photocopy of my letter to you, dated July 14, 1975, in which I attempted to set in motion a complaint to the Commission on commission expropriations by fund underwriters, but which so far only led to explanations by attorneys of two divisions, why a formal complaint cannot be brought before and entertained by the Commission.

To an upright man's way of thinking, such expropriations (a particularly crass case of which I have documented) is not a contractual dispute between two groups in the investment community where one group has the power, unfettered by the trade association to which both belong, to dictate the terms and conditions of an 'arrangement' which, even if called contract or agreement, is not an arms-length transaction. While the Commission may not entertain private disputes, the thievery of the funds in this sensitive area is a public outrage, not expected to be tolerated by a government agency.

In the pressure of time and other harrassment I have lost the copy of my letter and, whether or not a formal retraction of my complaint is necessary, I would greatly appreciate your having your secretary send me a photocopy.

However, what I am primarily addressing myself to you about is:

Administrative Proceeding File # 3-4659 .

I've always been amazed how little effect (and I don't mean material effect) suspensions and similar penalties have had within the brokerage community. Recalling names such as Lehman, Value Line and other prominent firms, I could never perceive - when publicity broke-- even a shrug.....

I, on the other hand, was shocked when the District Committee censured me because of an error of judgement. To my complete surprise, my appeal to the Board of Governors added a 10-day suspension. Such suspension, because of the virtual standstill of business, would have had little material effect. The publicity was repeated several times in the NASD publication.

F. K. KERPEN & COMPANY, INC.
FINANCIAL PLANNING SPECIALISTS
13 EAST 41ST STREET
NEW YORK, N. Y. 10017

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July 14, 1975.

Mr. George A. Fitzsimmons
Secretary
Securities and Exchange Commission
Washington, D.C.
20006.

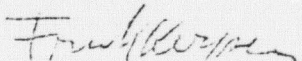
Dear Mr. Fitzsimmons:

The enclosed letter copy will give you an idea of what we small, independents have to put up with. If it serves any purpose in demonstrating the treatment or by the mighty of the poor and powerless in our section of the securities industry, please, attach it to my pending proceedings.

As for the original I would appreciate it very much if you would assist me in the manner and form of submitting a formal complaint. A copy of the dealer agreement amendment is also attached.

Thank you for your assistance in this matter.

Sincerely


Fred K. Kerpen

NASD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
1735 K STREET NORTHWEST • WASHINGTON D.C. 20006

March 19, 1976

7
MAR 23 1976

Certified Mail

F. K. Kerpen & Co., Inc.
27 Washington Square North
New York, New York 10011

Attention: Mr. Fred K. Kerpen

Re: Complaint No. NY-1896 - District No. 12
Kerpen (F.K.) & Co., Inc., et al

Gentlemen: -

Enclosed herewith is the Decision of the Board of
Governors in connection with the above matter.

Very truly yours,

Thomas D. Walsh

Thomas D. Walsh
Secretary

cc: Mr. Fred K. Kerpen
Encl.

BEFORE THE BOARD OF GOVERNORS

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of	:	
District Business Conduct Committee	:	
For District No. 12	:	
Complainant	:	<u>DECISION</u>
vs.	:	<u>Complaint No. NY-1896</u>
Kerpen (F.K.) & Co., Inc.	:	<u>District No. 12</u>
18 E. 41st Street	:	
New York, New York 10017	:	March 19, 1976
and	:	
Fred K. Kerpen, Registered Principal	:	
Respondents	:	

This matter was appealed by respondents Kerpen (F.K.) & Co., Inc., a member, New York, New York, and Fred K. Kerpen, registered principal, pursuant to the provisions of Section 15 of the Association's Code of Procedure for Handling Trade Practice Complaints. In a Decision of District Business Conduct Committee for District No. 12 dated July 31, 1975, respondents were censured, fined, jointly and severally, \$200 and assessed costs of the proceeding in the amount of \$450.35.

The District Committee found that during the period from September 30, 1972 to October 25, 1973, the member failed to send required quarterly financial statements to customers. The District Committee also found that there were book-keeping and recordkeeping deficiencies involving a securities position record, securities received and delivered blotter, customer ledger accounts and order tickets, as well as a failure to include the signatures of registered representatives on customer account cards and failure to indicate whether the customer is legally of age. The Committee dismissed allegations of filing inaccurate financial statements with the Association and allegations of net capital violations. The Committee concluded that the respondents violated Article III, Section 1 of the Association's Rules of Fair Practice and that their conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade.

As noted earlier, respondents appealed the decision by letter dated August 28, 1975. Thereafter, a hearing was held in the Association's office in New York City on October 15, 1975. Mr. Kerpen appeared and testified and he was accompanied by Mr. W. S. Wurzberger, president of Wurzberger, Morrow & Keough, Inc., a member, who stated that he had volunteered to be present to offer assistance to Mr. Kerpen in his appeal because he believed formal disciplinary action was unwarranted.

At the hearing, it was acknowledged that the first and second causes of complaint would have warranted institution of formal disciplinary action as they involved alleged net capital violations and inaccurate filing of financial statements with the Association. It was noted, however, that the District Committee had recomputed the member's net capital and dismissed these causes of complaint. The respondent and Mr. Wurzberger questioned whether formal disciplinary action would have been instituted had the only deficiencies involved the bookkeeping and recordkeeping matters covered under the third and fourth cause of complaint. As to the failure to send financial statements to customers from September 30, 1972 through October 25, 1973, respondents admitted that this was not done but noted the requirement did not become effective until September 30, 1972. Mr. Kerpen stated that he had been operating his firm for over ten years, during which time there was no such requirement, and he was simply unaware of the change, possibly because he had moved his office several times and did not receive notification of the new requirement. He stated that at the conclusion of the Association's examination, when the examiner informed him of the change, he immediately complied and there was no reason for not having complied earlier had he known of the new requirement.

As to the fourth cause of complaint, it was admitted that the member did not have a separate securities position record, but it was pointed out the required information was contained in other records of the member. It was also pointed out that had the member been advised that its records did not satisfy the requirement in this respect there would have been no reason not to comply, and in any event, when it was brought to the attention of Mr. Kerpen at the conclusion of the examination, he did, in fact, comply. With respect to a securities received and delivered blotter, it was pointed out that such was maintained and contained all the required information except the certificate numbers of the securities. It was also noted that the member had customer ledgers which contained all required information except for the failure to reflect receipt and delivery of securities. It was also pointed out that the member did record the day of the month but failed to record the hour of the day on order tickets and that, in the case of all the other deficiencies, once the

examiner called this to the member's attention the matter was remedied. It was admitted that the customer account cards did not always contain the signature of the representative introducing the account, although it was noted that in many cases this would have been Mr. Kerpen and it was also admitted that the customer account cards did not specifically state whether the customer was legally of age, although almost all of the account cards in the record contained the customer's date of birth.

We have carefully considered the entire record and we note that the member was examined by the Association staff in 1970 and then in October, 1973 with the latter examination resulting in this complaint. Our review of the examination report for the earlier examination reveals that most of the bookkeeping and recordkeeping deficiencies existed at that time and were known to the staff. Our review discloses that no letter of caution or other written communication to the member after the 1970 examination reflected these discrepancies. Also the testimony of the examiner before the District Committee indicates these discrepancies were never orally communicated to respondents. Under the circumstances, we feel Mr. Kerpen had a reasonable basis for concluding that his books and records were in compliance. With respect to his failure to send financial statements to customers, we note this involved a new requirement and we accept the representations of the respondents that they were simply unfamiliar with it. In this connection, we note that when informed of all of the deficiencies, remedial steps were immediately initiated. We also note that approximately 85% of the member's business has involved mutual funds and the deficiencies here noted relate to the member's general securities activities and we understand that the member is no longer involved in this area. We believe that normal procedures, but for the apparent net capital violations, which were dismissed, would have called for a letter of caution in view of the minor nature of the violations. Under all of the circumstances, therefore, we feel that it is appropriate that we dismiss this complaint and order that this dismissal serve as a letter of caution for the activities discussed above.

On Behalf of the Board of Governors

By Thomas D. Walsh
Thomas D. Walsh, Secretary

November 21, 1976.

Securities and Exchange Commission
Washington, D.C.
20549.

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Attention: Ms. Anne P. Jones
Division of Investment Management

I am a small broker/dealer. In nearly 25 years, except for the last 2, my main activity in financial planning was the distribution of Mutual Funds. Therefore I am vitally interested in the outcome of the hearings the Commission has announced, concerning "the appropriateness of arrangements whereby mutual funds would, directly or indirectly, bear expenses related to the distribution of their shares, such as the costs of advertising and providing compensation for dealers".

Accepting the invitation to interested persons to contribute ideas and suggestions, I herewith submit the following

S T A T E M E N T :

The trend in open-end investment companies is toward no-load. Whether this will eventually lead to a complete disappearance of the sales charge I am not prepared to speculate on. The end result of the development may well be a co-existence between no-load and low-load funds. Even during the heydays of mutual fund sales with a large part of the sales charge re-allowed to dealers (in some cases the full load), dealer compensation proved economically insufficient and additional compensation was established through give-ups. The elimination of give-ups severely handicapped the retail distribution of mutual funds in competition with other financial planning products and services, many of which, such as for instance life insurance, allowed for far wider profit margins. Add to this the disastrous, once-in-generation stock market decline and the poor performance of virtually all professional money managers and you have the explanation for the sorry state of the securities industry.

A semi-literate press which glorified go-go funds only a few years ago, now lashed out without mercy (and without discrimination) at the poor performance of mutual funds. The public, devoid of even an elementary knowledge of the rudiments of performance measurement, accepted with alacrity mutual funds as the fall guy for poor performance of equity-oriented portfolio management. It turned away from them - worse, it turned itself off.

This does not detract from the basic merits of mutual funds. They have opened up the way for millions of people, never before interested in, or capable of, participating in the fortunes of the economy, to "own a piece of America."

I have entered the educational process in the early 1950s. When the subject was brought up then, the usual reaction was: "Mutual Funds, what's that, insurance?" Up to only a few years ago the Wall Street Journal, whenever it mentioned mutual funds, took pains in explaining what they are. Merrill Lynch fought them tooth and nail. One of their executives deprecated mutual funds in a book on securities in general (now mercifully out of print). Life Insurance Companies, fearing a drain on the savings Dollar (a large portion of which they manage), opposed them vigorously. Now they own half the industry.

Seems, mutual funds are here to stay. Will their distribution by dealers, which is shrinking percentagewise, be concentrated in large firms? Can the small, independent survive?

To understand his predicament, it is necessary to take a look at the distribution system. Except for captive sales force organizations, most load funds sell through an underwriter, owned by or associated with the management company. The distributing company sells through dealers who retail funds and with whom it has a contractual arrangement, referred to as dealer agreement. This term is a misnomer. There is nothing negotiable about these agreements. The underwriter's only concern is competition with other underwriters. One party to the contract, the dealer, has absolutely no say whatsoever. The underwriters are in a position to fashion the terms of the 'agreement' at their pleasure. They can always change them at will - merely by putting an 'amendment' in the mail to the dealer. This unilateral position of strength of one party and the impotence of the other has led to abuses. In one particularly crass case, involving commission expropriation by fund underwriters, I have obtained a court settlement which annulled the grab and forced restitution on the thieves. It is typical for the prevailing situation that one particularly greedy underwriter (one of the defendants of the class action suit) was able, a year or two afterwards, to reverse the effect of the court decision, simply by issuing another 'amendment' and expropriating commissions which belong to me and 100s, if not 1,000s of dealers around the country.

Here is another concrete example: I have a score or two of clients who own investments in the Investment Trust of Boston. Because this is a relatively small fund, contrary to the trend in fund management without a family of funds behind it, I have never sued or pursued it. Recently ITB mailed to its dealers an 'amendment', according to which it will confiscate about half the commission on reinvested dividends and put them in its own pocket - with the rest going to dealers. For a number of years I have had a quarterly income of about \$ 50.00 -which

is now reduced to half. Such income reduction hits small small dealers, further diminishing their chance for survival.

Another abuse: Some funds - not all of them, there are always honest members in a community of thieves - have decided to assess dealers with part of their bookkeeping costs. Unilaterally, without negotiations, without even announcing the fact or reasons for it, they decree a cost roll-over - by fiat! Euphemistically referred to as 'amendment'. This again hits the small dealer the worst.

The NASD, the quasi-Governmental trade association is dominated by big firms. NYSE member firms with large mutual fund departments are more apt to absorb the loss of a few Dollars on commission expropriations and the cost of assessment for making out commission statements, than to make or support an effort to curb the voracity of funds who are their clients. All appeals, complaints and calls for assistance to my trade association have fallen on deaf ears.

By far the greatest disappointment, however, in this long and arduous struggle, to ward off commission expropriations and bookkeeping cost roll-overs, is the ostrich stance of the Commission. In the course of a disciplinary proceeding against me and my firm, # 3-4659, I have addressed numerous appeals, requests and complaints to various members of the staff of the Commission. All of them have met with identical responses: Courteous, non-committal letters.

Below is a list of my attempts to involve the Commission:

Letter, dtd,	7-14-75	(to Mr. Fitzsimmons (plus exhibits)
"	"	8-18-75 " " Goldberg
"	"	10-8-75 " " Albert
"	"	1-19-76 " " Fitzsimmons (" ")
"	"	4-26-76 " " Donaty
"	"	5-19-76 " " " (" ")
"	"	8-9-76 " " " (" ") !

The files may now be at the offices of the U.S. Court of Appeals, to be submitted there upon my request. However, it should be no problem to cull from them the necessary information so that the Commission in its attempts to find ways

' to allow funds to provide compensation for dealers in exchange for distribution of their shares ' may be guided in taking first steps to the restoration of dealer compensation, if, as in this case, by forcing the funds to be honest.

While it is true that I would personally benefit from that, it appears to me to be an idea, well-worth of execution for the general good, and one easily to be embedded in our existing, legal structure.

Fred K. Kerpen
Fred K. Kerpen
(212) 477-1183
752-8060 (10-4)

December 20, 1976.

Securities and Exchange Commission
Washington, D.C.
20549.

Att.: Ms. Anne P. Jones
Division of Investment Management.

A D D E N D U M

To STATEMENT by undersigned, dated November 21, 1976.

A few years ago one of the robber-baron fund managers - one of the first to turn over part of the costs of making out commission statements to the helpless dealer - introduced a new idea into commission accounting. Computers were set up to spew out comm. stmts. only when the total reached a minimum of \$ 10 or 20. Prior to that the small amounts would simply be retained by the fund until the minimum was reached.

A good idea which benefitted everyone concerned. The fund saved the cost of making out and mailing small commission statements, cutting checks, posting, etc. The dealer was not deprived of his hard-earned money and the whole thing kept the funds honest; there was no need to confiscate the small sums (which in the aggregate amounted to millions of Dollars.)

Lately I have observed one fund discontinuing this equitable practise (and sending out small checks again.) Perhaps there is a provision in the rules and regulations which prohibits such temporary withholdings. If there is it makes no sense, certainly not in the face of other NASd-members holding huge sums, belonging to the public, in discretionary accounts.

Be that as it may. I propose that the Commission take the initiative and promulgate a rule allowing - and as an add-on to taking positive action in the attempt to help the small independent to survive - encouraging fund underwriters to accumulate small commissions until they reach a minimum of, say \$ 10.- or 20.-, and then pay them out. (Rather than to convert them into their own pockets.)

If the Commission is really concerned in methods of providing dealers with compensation, here is an opportunity.

Fred K. Kerpen
Fred K. Kerpen
(212) 477-1183
752-8060 (10 - 4)

Exhibits: 4 Keystone fiats and a letter.
1 Putnam statement: Pay-out: \$ 4.60
1 Oppenheimer " : " " -.10 (!)



THE KEYSTONE COMPANY OF BOSTON

THE KEYSTONE BUILDING • 99 HIGH ST. • P.O. BOX 1311 • BOSTON, MASS. 02104

MAY 24 1976

9a

To All Keystone Dealers:

NEW SALES CHARGES AND COMMISSION SCHEDULE CHANGES

Effective June 1, 1976, sales charges will be reduced in compliance with the new NASD rules. The maximum level for any of the Keystone Custodian Funds (except B-1), Apollo and Polaris Fund will be 8.50% for individual sales of less than \$15,000 and the dealer concession will still be 6%. On sales of \$15,000 through \$25,000, the sales charge is reduced to 7.50% and the dealer concession is 6%. The sales charge for B-1 will be half that for the other Funds. There are other modest changes of sales charges and dealer concessions for larger purchases of Fund shares.

In addition to these changes, you may now offer shareholders the advantages of income dividend reinvestment at net asset value and the right of accumulation.

The sales charge changes and the new features are detailed in the accompanying supplemental stickers dated May 18, 1976. These stickers must be affixed to the appropriate prospectus and used in connection with all sales of these Funds until further notice. The enclosed request card is for your convenience in ordering quantities of the supplemental stickers so that you may forward copies to your interested offices and sales personnel. Your requests for stickers will be promptly filled. Thank you for your continued interest, support and cooperation.

If you have any questions, please do not hesitate to contact our Wholesale Representative in your area or call Field Sales Service at the Keystone Home Office.

The Keystone Company of Boston

Enclosures: Stickers dated May 18, 1976 for use on Keystone B-1, B-2, B-4, K-1, K-2, S-1, S-2, S-3, S-4, Apollo and Polaris Fund Prospectuses, Field Sales Service flyer and request card



THE KEYSTONE COMPANY OF BOSTON

THE KEYSTONE BUILDING • 99 HIGH ST. • P.O. BOX 1311 • BOSTON, MASS. 02104

June 15, 1976

96
DEC 18 1976

To Keystone Dealers:

On May 11, we mailed you an Amendment to Section 3 of our Dealer Agreement. Since this announcement, evidence has surfaced that one provision might be detrimental to certain classes of mutual fund sales.

Accordingly, and effective retroactively to June 1, 1976, we will pay full sales reallocation where the amount invested is less than the reduced concession previously indicated, provided the dealer concession generated is \$2 or more.

33 34
The change is duly noted on the enclosed formal Amendment which should be attached to the Dealer Agreement in your files.

Obviously, your continued support and interest in Keystone is our basic goal. We hope the above policy changes augers well for mutual fund sales in general and you and your clients in particular.

Sincerely,

James T. Grimaldi, President



THE KEYSTONE COMPANY OF BOSTON

THE KEYSTONE BUILDING • 99 HIGH ST. • P.O. BOX 1311 • BOSTON, MASS. 02104

JUN 18 1976

9c

June 15, 1976

Re: Amendment to Dealer Agreement

Gentlemen:

In accordance with Section 14 of your current dealer agreement, The Keystone Company of Boston hereby further amends such agreement as follows:

- (1) Effective retroactively to June 1, 1976 Section 3.(a)(3) is deleted in its entirety and Section 3.(a)(4) is renumbered to become Section 3.(a)(3).
- (2) Effective June 15, 1976 Section 3.(b) is amended to read as follows.
(b) Minimum Concessions Allowance
"No dealer concessions will be allowed on any individual purchase, per Fund, generating less than \$2.00 in dealer concessions."

This agreement should be attached to your current dealer agreement and retained in your files.

Very truly yours,

James T. Grimaldi, President



THE KEYSTONE COMPANY OF BOSTON

THE KEYSTONE BUILDING • 99 HIGH ST. • P.O. BOX 1311 • BOSTON, MASS. 02104

Re: Amendment to Dealer Agreement

Gentlemen:

In accordance with Section 14 of your current dealer agreement, The Keystone Company of Boston hereby amends such agreement effective June 1, 1976 by deleting in its entirety Section 3 and inserting in its place a new Section 3 which reads as follows:

3. You will receive a concession from the retail selling price on all shares purchased by you from us determined as outlined in the then current offering Prospectus of the particular Fund, and subject to the following limitations:

(a) Keystone Open Accounts

In all transactions in Keystone Open Accounts in which you are designated as Dealer of Record you will receive the concessions as set forth in the then current offering Prospectus of the particular Fund or Funds. You hereby authorize us to act as your Agent in connection with all transactions in Keystone Open Accounts in which you are designated as Dealer of Record.

(1) Rights to concessions on Open Account transactions are not vested.

(2) All designations as Dealer of Record and all authorizations of The Keystone Company of Boston to act as your Agent pursuant thereto shall cease upon the termination of this Agreement or upon the investor's instructions to transfer his Open Account to another Dealer of Record.

(3) With regard to all individual Open Account transactions where the amount invested is less than \$250, per Fund, the dealer concession shall be 70% of the concession payable in accordance with the terms of the then current offering Prospectus of the particular Fund or Funds.

(4) Dealer concessions due on all Open Account transactions from the 16th of one month through the 15th of the following month inclusive are accrued, reported and paid by means of a monthly Open Account Concession Statement which is usually mailed to the dealer between 5 to 10 days after the close of the statement period. A monthly \$2.00 statement charge is deducted from the total concessions due the dealer.

(b) Minimum Concessions Allowance

No dealer concessions will be allowed on any individual purchase, per Fund, generating less than \$1.00 in dealer concessions.

(c) Conversion Sales

With regard to purchases made in connection with the shareholder conversion privilege, when the current prospectus provides that the shareholder shall pay a charge equal to one half the normal sales charge, then the dealer concession will be an amount equal to one half the normal concession, except with regard to conversion purchases of less than \$50,000 in which case the dealer concession shall be further reduced as follows:

<u>Purchase</u>	<u>Percentage Reduction From Conversion Purchase Dealer Concession</u>
Less than \$15,000	50%
\$15,000 or more, but less than \$25,000	35%
\$25,000 or more, but less than \$50,000	25%

This amendment should be attached to your current dealer agreement and retained in your files.

Very truly yours,

James T. Grimaldi, President
The Keystone Company of Boston

MAY 13 1976
9d



THE KEYSTONE COMPANY OF BOSTON

THE KEYSTONE BUILDING • 99 HIGH ST. • P.O. BOX 1311 • BOSTON, MASS. 02104

ALBERT G. HARKINS
Assistant Vice President

December 8, 1976

92
DEC 2 1976

Mr. F.K. Kerpen
27 Washington Square North
New York, NY 10011

Dear Mr. Kerpen:

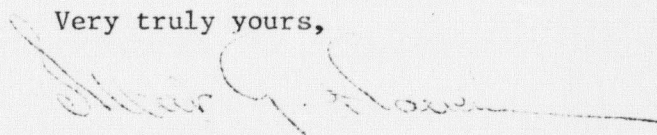
Thank you for your letter dated November 29, 1976.

To conform with the new NASD sales charge requirements effective June 1, 1976 we adopted and filed with the NASD a new rate schedule for sales charges and commissions.

One of the commission changes states that payment will not be made to a broker dealer unless the amount invested generates at least \$2.00 in commissions. Based on that figure, the amount invested must be at least \$33.34. The account you questioned on your recent commission statement invested \$30.00 and therefore did not comply with the new rates.

A letter was sent to all dealers in reference to this particular point, but we are enclosing a copy for your review.

Very truly yours,


Albert G. Harkins
Assistant Vice President

AGH/jm
Enclosure

OPPENHEIMER MANAGEMENT CORPORATION

ONE NEW YORK PLAZA, NEW YORK, N. Y. 10004

STATEMENT OF OPEN ACCOUNT
DIRECT PURCHASE TRANSACTIONS

OPPENHEIMER FUND

OPPENHEIMER AIM FUND—OPPENHEIMER TIME FUND

DEALER
F. R. KLEPIN & CO., INC. 4265

PERIOD
FROM 11/16/76 TO 11/30/76

TRANSACTION DATE	SHAREHOLDER NUMBER	NAME	FUND	TRANSACTION		CONCESSION	SALESMAN
				SHARES ACQUIRED	AMOUNT		
11/20	0007-5304	GULDNER NATHAN DP	OP	1.742 TOTALS	12.00 12.00	5.00 5.60	PA05 CLOLEY 0018
				TOTAL SALES		GROSS CONCESSION	AMOUNT OF CHECK
				12.00		.60	.50
							.10

99

LEGEND:
OP = OPPENHEIMER FUND
AI = OPPENHEIMER AIM FUND
TM = OPPENHEIMER TIME FUND

RECORDED AND PREPARED BY
INVESTMENT COMPANIES SERVICES CORPORATION
BOSTON, MASSACHUSETTS

DEALER STATEMENT

PUTNAM FUND DISTRIBUTORS, INC.

225 FRANKLIN STREET • BOSTON, MASSACHUSETTS 02110

DEAFER NUMER

PERIOD ENDING

PAGE NO.

1

12-06-76

F K KERPEN & CO INC
27 WASHINGTON SQ NO
NEW YORK N Y 10011

* FUNK CODES

1. THE GEORGE PUTNAM FUND OF BOSTON.
2. THE PUTNAM GROWTH FUND
3. PUTNAM INVESTORS FUND, INC.
4. THE PUTNAM INCOME FUND, INC.
5. PUTNAM EQUITIES FUND, INC.
6. PUTNAM VISTA FUND, INC.
7. PUTNAM VOYAGER FUND, INC.
8. PUTNAM CONFIDENT FUND, INC.

74-68-09-3663-07
SEP -1158 SAHADI

ROSENBERG H

12-06-76

100.00
100.00

13.18

7.587
7.587

6.20 6.20

1. INVESTING ACCOUNT	3. MONTH PLAN	6. PROTOTYPE PHOTO SHARING
2. PLAN WITH LIFE INSURANCE	5. M.C.W.P.	

100.00

STATEMENT - CHARGE 7.587

1.50-
4.70

98

F. K. KERPEN & CO., INC.
27 WASHINGTON SQUARE NORTH
NEW YORK, N. Y. 10011

File # 4 - 186
HEARINGS ON MUTUAL FUND
DISTRIBUTION CHARGES

December 20, 1976.

Securities and Exchange Commission
Washington, D.C.
20549.

Att.: Ms. Anne P. Jones
Division of Investment Management.

A D D E N D U M

To STATEMENT by undersigned, dated November 21, 1976.

A few years ago one of the robber-baron fund managers - one of the first to turn over part of the costs of making out commission statements to the helpless dealer - introduced a new idea into commission accounting. Computers were set up to spew out comm. stmts. only when the total reached a minimum of \$ 10 or 20. Prior to that the small amounts would simply be retained by the fund until the minimum was reached.

A good idea which benefitted everyone concerned. The fund saved the cost of making out and mailing small commission statements, cutting checks, posting, etc. The dealer was not deprived of his hard-earned money and the whole thing kept the funds honest; there was no need to confiscate the small sums (which in the aggregate amounted to millions of Dollars.)

Lately I have observed one fund discontinuing this equitable practise (and sending out small checks again.) Perhaps there is a provision in the rules and regulations which prohibits such temporary withholdings. If there is it makes no sense, certainly not in the face of other NASd-members holding huge sums, belonging to the public, in discretionary accounts.

Be that as it may. I propose that the Commission take the initiative and promulgate a rule allowing - and as an add-on to taking positive action in the attempt to help the small independent to survive - encouraging fund underwriters to accumulate small commissions until they reach a minimum of, say \$ 10.- or 20.-, and then pay them out. (Rather than to convert them into their own pockets.)

If the Commission is really concerned in methods of providing dealers with compensation, here is an opportunity.

Fred K. Kerpen
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(212) 477-1183
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Exhibits: 4 Keystone fiats and a letter.
1 Putnam statement: Pay-out: \$ 4.60
1 Oppenheimer " : " " -.10 (!)

F. K. KERPEN & CO., INC.
27 WASHINGTON SQUARE NORTH
NEW YORK, N. Y. 10011

File # 4 - 186
HEARINGS ON MUTUAL FUND
DISTRIBUTION EXPENSES.

December 30, 1976.

11

Securities and Exchange Commission
Washington, D.C.
20549.

Attention: Ms. Anne P. Jones
Div. of Investment Management.

S E C O N D A D D E N D U M

To STATEMENT by undersigned, dated November 21, 1976.

Please don't tell me that the time for suggestions has passed. If the concern of the Commission 'in seeking ways to allow funds to provide compensation for dealers in exchange for distribution of their shares,' is the survival of the dealer, then this is an on-going concern. Well, the stealing of pennies (out of dealers' pockets) is an on-going expropriation. The two don't mix. One or the other has to prevail.

So that the Commission may gain some insight into the how-abouts of commission expropriation, I'm sending you today statements of each of the few Anchor Growth accounts (for which this firm is the dealer) together with a commission statement which records every transaction. See how much is reinvested at the applicable sales charge - and what percentage of it stays in the underwriter's pocket. The total of reinvested dividends is about 1,000 Dollars, the total commission \$ 10.00 !

Fred K. Kerpen
Fred K. Kerpen

PS

Since writing but before mailing this letter I received another commission statement from the same underwriter on another fund: SAME THIEVERY.



DIVISION OF
INVESTMENT MANAGEMENT

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

January 11, 1977

JAN 17 1977

12

Mr. Fred K. Kerpen
F.K. Kerpen & Co., Inc.
27 Washington Square North
New York, NY 10011

Re: The Bearing of Distribution Expenses by Mutual Funds
File No. 4-186

Dear Mr. Kerpen:

We appreciate receiving your comments on the "Bearing of Distribution Expenses by Mutual Funds" and your concern in this matter. We have placed your comments in the public file, 4-186.

I can assure you that the recent public hearings as well as the written comments of interested persons have been of significant assistance to the staff in preparing our recommendations to the Commission.

Sincerely,

Anne P. Jones
Director

13

January 22, 1977.

Ms. Anne P. Jones
Director
Securities & Exchange Commission
Washington, D.C.

Re: The Bearing of Distribution Expenses
by Mutual Funds.
File: 4-186

Dear Ms. Jones:

Thank you for your letter of January 11, 1977. I'm glad you appreciate my concern. Your assurance that public hearings as well as the written comments of interested persons have been of significant assistance to the staff is heart-warming.

But will there ever be action ?

The millions the funds have arbitrarily taken away over the years will remain in their pockets. How about tomorrow, next week, next month, next year?

In closing this chapter I'm mailing you today copies of commission statements of a fund organization which was forced to honesty in a successful class action suit, but which reversed the terms of the settlement within a year to terms worse than the status quo - without arousing any opposition from the NASD. Only the first page is fully reproduced by stapling two photostats together as the format does not lend itself to copying by any standard copying machine. (The remaining pages show the expropriation parts). This fund organization is too haughty or too stupid or both to put commission statements on standard formats. One of the first to turn over to dealers part of the cost of making out commission statements, it steadfastly refuses to furnish dealers with an extra copy which they need to pay their salesmen.

A bad conscience seems to compel them to print-out every transaction on commission statements, including those on which their expropriation formula has reduced commissions to zero. There they show two zeros in the penny column.

By contrast some other thieves expropriate commissions without bothering to print-out any other transactions than those on which they design to be honest. I'll be glad to send you some samples.

Also samples from commission statements a few years back, when every item was printed out, the applicable commission shown - and paid when due to dealer.

Sincerely
Fred K. Kerpen
Fred K. Kerpen

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 12898 / October 15, 1976

Admin. Proc. File No. 3-4659

OCT 26 1976

In the Matter of the Application of

F. K. KERPEN & CO., INC.
27 Washington Square North
New York, New York

and

FRED K. KERPEN

For Review of Disciplinary Action Taken by the
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Rules of Fair Practice

Failure to Supervise

In proceeding for review of disciplinary action by registered securities association, where registered principal of member of association failed to take timely steps to discover conversion of customers' funds by member's registered representative and prevent such incidents from occurring in the future, association's imposition of sanctions, affirmed.

APPEARANCES:

Fred K. Kerpen, for applicants.

Lloyd J. Derrickson and Andrew McR. Barnes, for the National Association of Securities Dealers, Inc.

Review proceedings with respect to a decision dated March 11, 1975, by the Board of Governors of the National Association of Securities Dealers, Inc. The record was certified to the Commission on October 11, 1975. Oral argument was waived.

- - - - -

F. K. Kerpen & Co., Inc. ("the firm"), a member of the National Association of Securities Dealers, Inc. ("NASD"), and Fred K. Kerpen ("Kerpen"), its registered principal, seek review of disciplinary action taken against them by the NASD. The NASD found that Kerpen

and the firm failed properly to supervise a registered representative who converted certain customers' funds to his own use, and that such failure resulted in violations of Sections 1 and 27 of Article III of the NASD's Rules of Fair Practice. 1/

The NASD imposed censure upon, and assessed costs against, both Kerpen and the firm, and imposed a ten-day suspension from association with any NASD member upon Kerpen. 2/

The incidents giving rise to the NASD's action against Kerpen and the firm relate to the conduct of Fabian Nebenzahl, formerly a registered representative with the firm. The NASD's findings concerning Nebenzahl's misconduct, which are discussed below, are not disputed by applicants; nor has Nebenzahl sought Commission review of the disciplinary action taken against him by the NASD as a result of such findings. 3/ The applicants do, however, disagree with the NASD's conclusions with regard to what Kerpen should have done to discover Nebenzahl's improper actions and prevent some of them from occurring. Applicants also suggest that, to the extent they might have violated the NASD's Rules of Fair Practice, the sanctions imposed by the NASD are excessive.

The NASD found that, during the period from about August 15, 1968 to April 3, 1970, Nebenzahl, on four separate occasions, caused the liquidation of shares of The Dreyfus Fund, Inc. in the accounts of two of his customers, and converted the funds received from such liquidations to his own use. Furthermore, the NASD found that during this same period Nebenzahl received seven checks from three different customers intended for investment in either The Dreyfus Fund, Inc. or The Dreyfus Leverage Fund, Inc., and that in these instances Nebenzahl also converted the monies to his own use.

-
- 1/ Section 1 of Article III requires the observance of high standards of commercial honor and just and equitable principles of trade. Section 27 of Article III requires, inter alia, that each member establish and enforce written procedures which will enable it to supervise properly the activities of registered representatives to assure compliance with applicable laws and NASD rules; and that each member periodically examine customer accounts to detect and prevent irregularities. Section 27 also provides, inter alia, that final responsibility for proper supervision rests with the member.
 - 2/ The ten-day suspension represented an increase of the sanction by the NASD's Board of Governors over that imposed by the District Business Conduct Committee, which had imposed only censure upon Kerpen and the firm and assessed costs. The District Committee also ordered Kerpen and the firm to follow certain procedures concerning supervision and hiring of sales personnel, and the handling of customer complaints. The Board of Governors eliminated the specific imposition of these obligations, stating that such imposition was unnecessary since the obligations were imposed upon Kerpen and the firm by virtue of their registrations with the NASD.
 - 3/ The NASD found that Nebenzahl had violated certain provisions of Article III of its Rules of Fair Practice, and permanently barred him from association with any member of the NASD. The NASD also fined Nebenzahl \$25,000, and assessed costs against him.

Kerpen terminated Nebenzahl's employment with the firm in September 1971, following the receipt of complaints in July of that year from three of the customers whose funds were converted by Nebenzahl. However, the NASD concluded that Kerpen should have acted sooner. It found that Kerpen had reason to believe, at least as early as February 1970, that Nebenzahl had converted a customer's monies intended for investment. This customer instituted legal action resulting in a judgment against Nebenzahl on October 10, 1970. Kerpen was served with an attachment in connection with that case, although the attachment was released shortly thereafter when the customer apparently agreed to accept Nebenzahl's promise of restitution.

The NASD reasoned that these events, coupled with the fact that Kerpen had earlier received a copy of a complaint from one of Nebenzahl's customers to the Dreyfus Fund concerning unauthorized liquidations of his and his wife's accounts, should have prompted Kerpen to investigate thoroughly Nebenzahl's accounts and activities. The NASD also noted that, even as late as the hearing before the District Business Conduct Committee, Kerpen had not drafted new supervisory procedures which would prohibit representatives from accepting cash from customers for investment. The NASD suggested that, in view of the circumstances, such a failure illustrated an intolerably lax attitude on the part of Kerpen with regard to his supervisory responsibilities.

The applicants argue, in effect, that their failure to take action against Nebenzahl at an earlier date was not unreasonable in view of the circumstances existing at the time. They suggest that the first question to come to Kerpen's attention regarding Nebenzahl's handling of accounts was the aforementioned complaint by a customer to the Dreyfus Fund concerning unauthorized liquidations. It is contended that this complaint, which involved allegations of forgery, seemed incredible when it was made, even though the allegations later proved to be correct. Applicants suggest that Kerpen's failure to take such allegations seriously at the time was reasonable in view of the fact that Nebenzahl previously had enjoyed a good reputation in the broker-dealer community, and in view of the further fact that the Dreyfus Fund failed to communicate with applicants further with respect to this matter after forwarding the complaint.

The NASD concedes the possibility that Kerpen might have been justified initially in overlooking this complaint. It appears to have considered his knowledge of this complaint only in the context of Kerpen's failure to investigate Nebenzahl's activities after it later became clear that another of his customers was experiencing difficulty. The applicants argue, in substance, that by the time of the later complaint, the earlier one had been dismissed from Kerpen's mind and thus is not relevant to the question of what action he should then have taken. The applicants go on to suggest that, with respect to the later complaint, the customer did not pursue the legal action he had instituted; that Nebenzahl attempted to make restitution; and that Kerpen felt at the time that he should attempt to rehabilitate Nebenzahl, rather than deal harshly with him.

We are not persuaded by such reasoning, particularly in view of the clear responsibility for supervision which long has been imposed upon broker-dealers and persons controlling them. ^{4/} Even assuming, arguendo, that Kerpen was justified in not terminating Nebenzahl's employment with the firm immediately when it became clear that at least one customer's funds had been converted, Kerpen at the very least should have examined thoroughly all of Nebenzahl's accounts, especially the one which had been the subject of the earlier complaint to the Dreyfus Fund. Accordingly, we affirm the NASD's findings of violation.

The only remaining question is whether the sanctions imposed by the NASD are excessive or oppressive. ^{5/} The applicants argue that they are, at least with respect to the ten-day suspension imposed upon Kerpen. They object to what they suggest is the NASD's reliance upon Kerpen's failure to draft new supervisory procedures which would prohibit registered representatives from accepting cash for investment. They contend, inter alia, that such new procedures were not necessary because the volume of the firm's business had dwindled to virtually nothing by the time the proceeding against applicants was instituted, and that failure to draft such procedures does not reflect a lax attitude on the part of Kerpen. They also suggest that suspension is unnecessary in this case since the firm no longer has any full-time employees, and Kerpen himself devotes only part of his time to it.

The NASD fashioned the sanctions in light of its finding that Kerpen failed to investigate thoroughly Nebenzahl's activities for a considerable period of time after the need for such an investigation should have been clear. Its observation concerning Kerpen's failure to draft new procedures was only incidental to that finding. We recognize that Kerpen's personal honesty has not been called into question in this proceeding. This fact, coupled with Kerpen's acknowledgement that he did not use proper judgment in dealing with Nebenzahl, is sufficient to convince us that applicants are unlikely to repeat these violations.

However, we are mindful that impressing upon applicants the importance of their obligations is only one of the purposes of imposing sanctions. The sanctions in this case are also intended to illustrate to other persons the commendable seriousness with which the NASD regards a failure to supervise properly, a concern fully shared by this Commission. ^{6/} Under the circumstances, we are unable to conclude that the sanctions

^{4/} See, e.g., R. H. Johnson & Co., v. S.E.C., 198 F. 2d 690 (C.A. 2, 1952), cert. denied, 344 U.S. 855 (1952); Kamen & Company, 43 S.E.C. 97 (1966); and L. B. Securities Corporation, 42 S.E.C. 885 (1966).

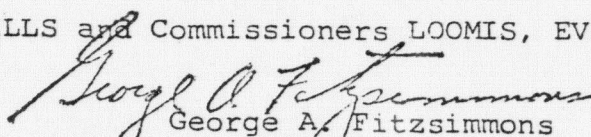
^{5/} Section 19(e)(2) of the Securities Exchange Act of 1934. That section also includes within our review function the question of whether a sanction imposes an undue burden on competition. The applicants have made no claim that such a burden is imposed in this case, nor would there appear to be any basis for such a claim.

^{6/} See Kamen & Company, supra, note 4. Compare Reuben Rose & Co., Inc., 43 S.E.C. 110 (1966).

imposed on applicants are excessive or oppressive. 7/

An appropriate order will issue.

By the Commission (Chairman HILLS and Commissioners LOOMIS, EVANS and POLLACK).


George A. Fitzsimmons
Secretary

-
- 7/ In arriving at our determination with respect to this matter, we see no relevance in applicants' suggestion that only they, and not the investment company the shares of which were improperly redeemed, have been the subject of disciplinary action. Nor could Kerpen's failure properly to supervise be excused by the fact that certain of Nebenzahl's customers might have assured Kerpen that the difficulties were being dealt with adequately. Cf. Hughes v. S.E.C., 174 F. 2d 969 (C.A.D.C., 1949).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 12898 / October 15, 1976

Admin. Proc. File No. 3-4659

In the Matter of the Application of

F. K. KERPEN & CO., INC.
27 Washington Square North
New York, New York

and

FRED K. KERPEN

For Review of Disciplinary Action Taken by the

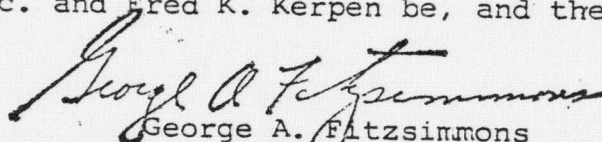
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

ORDER AFFIRMING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the sanctions imposed and the costs assessed by the NASD
against F. K. Kerpen & Co., Inc. and Fred K. Kerpen be, and they here-
by are, affirmed.

By the Commission.


George A. Fitzsimmons
Secretary

F. K. KERPEN & CO., INC.
27 WASHINGTON SQUARE NORTH
NEW YORK, N. Y. 10011

January 28, 1977.

Mr. A. Daniel Fusaro
Clerk
U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, NY, 10007.

Docket # 76-4236

Gentlemen:

Fred K. Kerpen
vs
S.E.C.

Enclosed is a copy of my brief and exhibits.

Seven more copies are enclosed in a separate cover.

One copy was sent to the SEC, as per attached letter.

Sincerely,

Fred K. Kerpen
Fred K. Kerpen

PS ALSO ENCLOSED
8(1+1) COPIES OF
SEC ORIGIN

(212) 477-1183
752-8060 (10-4)

F. K. KERPEN & CO., INC.
27 WASHINGTON SQUARE NORTH
NEW YORK, N. Y. 10011

January 28, 1977.

Docket # 76-4236

Mr. Sammy S. Knight
Attorney
Securities and Exchange Commission
Washington, D.C.
20549.

Dear Mr. Knight:

Thank you for your letter of November 23, 1976, informing me Mr. David Ferber, Solicitor to the Commission, Mrs. Kathryn McGrath, Assistant General Counsel and you will be representing the Commission.

Also for your letter of December 3, 1976 in which you enclosed two copies of the certified list of record which you filed with the Clerk of the United States District Court for the Second Circuit.

Enclosed, please, find a copy of my brief plus exhibits, seven other copies of which I'm filing simultaneously with the Clerk of the Court.

Thank you also for your cooperation.

Sincerely


Fred K. Kerpen

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752-8060 (10-4)